

IN THE HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION (CIVIL) NO.8449 of 2008

Reserved on : 06-12-2010

Date of pronouncement: 19-01-2011

SHIKHA ARORA

..... Petitioner

Through: Mr. R.K. Saini, Adv. with Mr. Sitab
Ali Chaudhary, Adv.

versus

DSSSB AND ANR

..... Respondent

Through: Mohd. Sajid & Mohd. Suhail, Adv.
for Respondents 1-2

CORAM:

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

SUDERSHAN KUMAR MISRA, J.

1. The petitioner is aggrieved of the non-consideration of her case for recruitment to the post of Assistant Teacher (Primary) in Directorate of Education, Govt. of NCT of Delhi, pursuant to an advertisement stated to have been issued by the respondent on 27th July, 2006.

2. By that advertisement, the Delhi Subordinate Services Selection Board, had invited applications for appointment to the post of Assistant Teacher (Primary) in the Directorate of Education, Govt. of NCT of Delhi. It was stated that there are 1254 vacancies, out of which 563 were under the reserved category. The petitioner is

admittedly a general category candidate. It is the petitioner's case that she fulfilled all the essential criteria for the appointment. The selection consisted of a two part examination. The first part, or Part I was of an, "objective", nature, while Part II was, "descriptive". Those candidates who qualified in the objective type examination, i.e. the Part I examination, were permitted to participate in the Part II examination.

3. The petitioner participated in both Parts I and II examinations. Both the examinations consisted of 200 marks each. The Part I examination was held on 25th March, 2007 whereas the Part II examination was held on 6th May, 2007. The petitioner obtained 89.50 marks out of 200 in the Part I examination and 75 marks out of 200 in the part II examination. Consequently, out of 400 marks in all, she obtained 164.50 marks. The overall percentage of the marks obtained by the petitioner in the two examinations, taken together, comes to 41%.

4. Admittedly, the petitioner's rank is 411 in the general/unreserved category. As per the advertisement, the unreserved vacancies were 563. The petitioner contends that, under these circumstances, she ought to have been offered an appointment because nothing more was required to be done in the matter.

5. It is the case of the respondents that in terms of a policy dated 31st March, 2007 of the Subordinate Services Selection Board i.e. respondent No. 1, the candidates are also required to obtain certain minimum marks both in the Part I examination, and again in the overall percentage of marks in both Part I and Part II examinations. According to the respondent, the minimum marks fixed

for the Part I examination for the petitioner was 40%. In addition, a minimum overall percentage of 45% was also required after adding the marks of Part I and Part II. It is stated that although the petitioner was above the cut off for the Part I examination, however, she did not make the cut off of 45% prescribed for the overall aggregate.

6. It is the case of the petitioner that this provision, fixing cut off marks, was not mentioned in the advertisement inviting applications for recruitment. More importantly, it is also contended that in any case, the aforesaid criteria for cut off marks was admittedly set down only on 30th March, 2007 by respondent No. 1, i.e. after the Part I examination had already been held earlier on 25th March, 2007. In short, the case of the petitioner is that once the recruitment process has started and the examination itself has been conducted, it is not open to the respondents to thereafter prescribe any additional criteria with regard to the recruitment.

7. In this context, counsel for the petitioner relies on a decision of the Supreme Court in **Hemani Malhotra Vs. High Court of Delhi**, (2008) 7 Supreme Court Cases 11 (paras 14 to 16). There also, at the beginning of the selection process, no minimum cut off marks for viva voce were prescribed. They were prescribed after the entire selection process was completed. In that case, the Supreme Court was of the view that this would amount to changing the rules of the game after the game has been played. In an earlier decision of the Supreme Court in **K.Manjusree Vs. State of A.P.** (2008) 3 SCC 512, also it was clarified that although the prescription of minimum marks is not illegal, and it is open to the authorities to prescribe Rules

laying down minimum marks wherever it considers necessary to do so; however, if the selection committee wants to prescribe minimum marks, "it should do so before the commencement of the selection process". Significantly, it was stated in para 15 of that judgment that where no minimum marks are prescribed before the commencement of selection process, the authority concerned cannot, "either during the selection process or after the selection process, add an additional requirement/qualification that the candidate should also secure minimum marks.....".

8. Similarly, a Division Bench of this Court in LPA No. 65/2008, titled **Surender Singh & Anr. Vs. DSSSB & Ors.**, decided on 3rd November, 2008, held that fixing of the cut off marks after completion of the written examination would be impermissible as held by the Supreme Court in **Hemani Malhotra (supra)**. In that case, a controversy arose with regard to an examination being conducted by the Delhi Subordinate Services Selection Board sometime in May, 2006, for filling up vacancies for the post of Teacher (primary) in the schools run by Municipal Corporation of Delhi. There, the general instructions admittedly granted the Board full discretion to prescribe qualifying marks in the examination. However, before the examination was conducted, the respondents failed to actually prescribe the minimum qualifying marks. It was in these circumstances that the Court held that even though the power to fix the marks was there, that power must be exercised before the commencement of the process.

9. Counsel for the respondent also relies on a decision of this Court in **Ghanshyam Das vs. DSSSB & Ors.** in W.P.(C) No. 15964-

66/2006 decided on 29.11.2007. This authority, and in particular, paragraph 30-31 only reiterate the law laid down in **Hemani Malhotra's case** (supra) regarding the powers of the Board/authorities to prescribe minimum qualifying marks. It is not even the case of counsel for the petitioner that the Board does not have the power to prescribe minimum qualifying marks. The only aspect urged is that prescribing minimum qualifying/cut off marks once the process has already commenced and the examination has already been taken, amounts to changing the rules of the game, after the game was played. That is not to say that it was not open to the Board to prescribe minimum cut off marks for any other forthcoming examination to be held in future, but only that it could not prescribe such marks after the process had begun. This authority therefore does not help the respondent.

10. Counsel for the respondent then relied on a decision of this Court in W.P.(C) No. 6478/2008, titled **Shweta Sharma vs. Govt. of NCT of Delhi & Ors.**, on 5.9.2008 where, by a short order, the writ petition filed by a party seeking a direction to the DSSSB to "include her name in the list of successful candidates of Part I examination for making her eligible for evaluation of her question-cum-answer booklet of Part-II examination for the post of TGT(Hindi) held on 11.5.2008", was dismissed in limine, noting that since the petitioner's name did not figure in the list of candidates shortlisted in terms of the policy, therefore, directions, as prayed for, cannot be issued. I am afraid that I am not persuaded to follow this decision since the matter was dismissed in limine by a short order without the necessary discussion and the issues which are being raised in this petition do not appear to

have been either raised or considered by the Court in that matter.

11. Admittedly, out of 563 unreserved vacancies that were available, and for which the examination in question was held, only around 400 persons were appointed. The petitioner was ranked 411, but could not be appointed, even though the vacancy existed, because she did not make the so called cut off marks with regard to the overall aggregate that came to be prescribed by the respondent after the selection process had commenced.

12. Under the circumstances, and for all the aforesaid reasons, the interim orders passed on 28.11.2008 are made absolute. The respondents are now directed to consider the petitioner for appointment against the post of Assistant Teacher (Primary) in the Directorate of Education, Govt. of NCT of Delhi, pursuant to the advertisement dated 27.07.2006, without any weightage being given to the aforesaid cut off marks, subject to her completing all other formalities like medical examination etc., within one month from today.

13. For the removal of any doubts, it is clarified that the appointment of the petitioner shall be with effect from the same date, as that of the other candidates, who were selected, although she shall not be entitled to any back wages. She shall, however, be entitled to benefits of continuity of service and notional seniority from the date when the other candidates were appointed in terms of the said advertisement.

14. As regards the apprehension of counsel for the respondent that there may be some other candidates who had also secured the

same or more marks than the petitioner, but were not considered because of the impugned cut off marks; it is made clear that it is only the petitioner who chose to approach this Court, and, as explained in, **Chairman, U.P. Jal Nigam and Anr. Vs. Jaswant Singh and Anr.** 2006 (11) SCC 464, it is possible to restrict the relief to be granted to those persons who approach the Court. Consequently, and looking to the fact that nearly four years have passed since the impugned examination was held, the respondents are under no obligation to consider anyone else who has failed to approach this Court in a timely fashion; also for the reason enunciated in the latin maxim, *vigilantibus et non dormientibus jura subveniunt* – the vigilant, and not the sleepy, are assisted by the laws; And, *interest reipublicae ut sit finis litium* – A party who is insensible to his remedies or who does not assert his own claims with promptitude has no right to seek the aid of the State.

CM APPL. No. 16262/2008

15. In view of the orders passed in the main petition, this application is rendered infructuous and the same is disposed of as such.

SUDERSHAN KUMAR MISRA, J.

January 19, 2011

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